# PERFORMANCE AND MĀORI CUSTOMARY LEGAL PROCESS

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There are two reasons for our interest in the "performance" aspect of Māori customary law. The first reason arises from the task which Te Mātāhauariki Institute has set itself: to explore ways in which the New Zealand legal system might reflect the best concepts and values of both our major founding cultures. That objective implies that there is sufficient compatibility and identity between the concepts and values of Māori customary law and those of the English common-law system, which arrived in Aotearoa/New Zealand with the Treaty of Waitangi in 1840, for these concepts and values to function together or in association, or even contribute to the evolution of a third and new "hybrid" system. Alex Frame (2002) has used the shorthand expression "1+1=3" to describe that process and to emphasise that it would not involve either assimilation or extinction of the founding systems. The search for compatibility therefore immediately drives us to enquire into the significance of the fact that the instruments of English law are primarily *written* statutes, contracts, deeds etc., whereas those of Māori law are *performances* from a customary repertoire of songs, chants, dances, ceremonial acts of various types, carvings and so on.

A second reason for our interest flows from our *Te Mātāpunenga* project, which aims to assemble a compendium of historical references to the institutions and concepts of Māori customary law. We have asked ourselves whether such a project is possible without a very considerable recognition that the translation of Māori institutions and concepts to verbal norms and descriptions runs a great danger of leaving something important and vital behind—the performance element.

We have found the work of Professor Bernard Hibbitts at the University of Pittsburgh School of Law to be helpful in opening up our thinking to the significance of the "performance aspect" in so-called "oral cultures".[1] Hibbitts writes:

> …the performative understanding of law differs profoundly from our own. In a writing culture that can physically separate contracts, judgments, and statutes from their proponents, we consider law to exist apart from, and indeed above, human individuals. This attitude is perhaps best captured in the

> aspirational phrase "a government of laws and not of men". In performance cultures, however, laws and men are virtually coincident. Finding the law generally means finding someone who can perform or remember it (Hibbitts 1992:956).

Hibbitts' analysis of "performance cultures"—a term he prefers to "oral cultures"—begins from the observation that, in the words of F.W Maitland: "So long as law is unwritten, it must be dramatised and acted. Justice must assume a picturesque garb or she will not be seen" (Maitland 1911:427).

Hibbitts develops a number of characteristics of "performed law".

- It is *personal*:
  Without the performer, there is no performance. In this environment, individuals quickly come to associate what is performed with who is performing. Information cannot exist independent of the status or reputation of the human individual presenting it. The objective appreciation of a message is inevitably entangled with a subjective appreciation of its messenger (Hibbetts 1992:956).

- It is *social*:
  Communicative success depends on the live performer actually appearing before a live audience…Individuals in performance-based societies become so accustomed to and dependent upon contact with one another that they tend to conceive of the very idea of "self" in social terms, identifying themselves primarily by their social relationships and the opinion that others have of them. This encourages the development of outwardly orientated "shame cultures" as opposed to inwardly orientated "guilt cultures" (Hibbetts 1992:957).

- It is *dynamic*:
  The dynamism of performance is arguably reflected in the performative inclination to think of law not as things but as acts, not as rules or agreements, but as processes constituting rule or agreement. A performative contract, for instance, is not an object but a routine of words and gestures…Likewise, members of performance cultures tend to think of justice not as something that simply is, but rather as something that is done (Hibbetts 1992:959).

- It is *ephemeral*:
  …the ephemerality of performance encourages members of performance cultures to organise and orchestrate performance to maximise memorability and minimise the likelihood of change. In many performance cultures, these goals are accomplished by a combination of publicization, concretization, and stylization (Hibbitts 1992:959).

We hope to bring out some of these features in the examples we deal with in the next section of this article.

Before Hibbitts, however, Johan Huizinga from his Chair of History at Leyden in the 1930s had noted the importance of the "play-element" in law. An entire chapter of his illuminating study of *The Play Element in Culture* is devoted to "Play and Law":

> That an affinity may exist between law and play becomes obvious to us as soon as we realize how much the actual practice of the law, in other words, a lawsuit, properly resembles a contest whatever the ideal foundations of the law may be (Huizinga 1970:97).

It is important to guard against the common error of thinking that this connection between law and performance and play in any sense trivialises legal process. On the contrary, Huizinga's study led him to trace the connection to the very roots of civilisation:

> ...a mental world in which the notion of decision by oracles, by the judgement of God, by ordeal, by sortilege (i.e. by play) and the notion of decision by judicial sentence, fuse in a single complex. Justice is made subservient—and quite sincerely—to the rules of the game (1970:100).

We must be prepared to consider, therefore, that the "play model" in social activity extends as a technique beyond "mere" amusements to the settling of "serious" matters such as law suits and the allocation of power in society.[2]

This then is some of the background to the mode of analysis adopted in this article. That mode studies "performances" from the customary repertoire as the instrument of legal transactions and as analogous to the written documents of legal systems reliant upon the written word. Of course, there is room left to vary and adapt the customary repertoire within certain limits, and no doubt the skill of the "performer" lies in challenging the limits so as to maximise the advantage.

When Sir Henry Maine came to analyse the origins and development of the legal system centred at Westminster, he noted the central importance of the "forms of action"—the limited repertoire of procedural "moves" in which a complaint could be presented to the King's courts - and made the famous observation that "substantive law has at first the look of being gradually secreted in the interstices of procedure" (Maine 1886:389).

For us, therefore, the question becomes that suggested by Hibbitts: what legal information is conveyed by a particular performance? More particularly, what rights and obligations are created and discharged? How are relations changed and how is status established? What statements of legal relations are being made? What legal remedy is being exercised?

A further and important question will be: who is socially authorised to give a particular performance? It can by no means be assumed that *anyone* can perform *anything*. Status, in its various manifestations, becomes significant. Indeed, some observers have suggested that, insofar as some performances require "rank", they could be seen as a means of asserting and reinforcing the rank of the performers: "…where *who* can speak is the primary concern, political discourse may better be analysed as the reproduction of relations of dominance rather than as the exercise of 'power'" (Brenneis and Myers 1984:3).

We think that there is a danger of putting the cart before the horse in this kind of analysis. Although one effect of successful performances which require rank is doubtless to affirm the rank of the performer, there will be many occasions in which that rank is already well established. In those cases at least, it seems implausible to elevate the incidental effect of reinforcement of rank over the primary purpose of creating and discharging legal rights and obligations.

Sir Henry Maine's dictum at the end of Chapter V of *Ancient Law*, first published in 1861, described by Sir Carlton Allen as "among the most famous in the whole English juristic literature", was: "We may say that the movement of the progressive societies has hitherto been a movement from status to contract" (Maine 1959:141). A favourite examination question in "jurisprudence" courses covering Maine's work asks to what extent the statement was true of 19th century English law and where this "movement" might be going in modern times, when so many rights depend on our status, e.g., on being "employees" or "consumers" or "Members of Parliament" or of a certain age. If contractual freedom has diminished and "status" is making a comeback, are we to think that modern Western societies are no longer "progressive"? Or should we rather be confirmed in our scepticism about the usefulness of this kind of analysis that is based on a supposed scale from "primitivity"?

As is stressed in the draft Introduction to *Te Mātāpunenga*,[3] we reject the idea that "performed" customary law is to be regarded as "primitive" in comparison to the "advanced" or "sophisticated" development of "written" law:

> The idea that social norms found in traditional, performance cultures were either not law at all, or at best only "primitive law", has been a persistent one in European jurisprudence. It is often found coupled with analyses which propose an "evolutionary scale" for law in which fully-fledged law only emerges as societies struggle into the blinding light of written law, administered in a centralised way, by specialist courts, whose decisions are recorded in leather-bound annual tomes (Frame and Benton n.d.:8)

The draft Introduction discusses the "levels of evolution" model, linked to social and economic organisation, favoured by Sir Henry Maine and others, including the New Zealand legal scholar R.C. Maclaurin writing a century ago, and concludes that:

> We need not be Marxists to agree that Maclaurin was surely right to relate the concepts and institutions of any legal order to the circumstances in which it serves. However, it would not seem to be either a necessary or a desirable step to derive from such analysis any classificatory or definitional "scale" of law as more or less "primitive". Concepts, institutions, and procedures may be judged to work, or not work, in a particular social context, but that does not seem to provide a basis for describing law as "primitive" or "advanced", any more than a particular language could intelligibly be characterised in that way (Frame and Benton n.d.:9).

Use of the expression "primitive" is misleading in the further sense that a particular set of criteria are chosen by which to measure "sophistication". Other criteria could be proposed which might produce different orderings. For example, if social cohesion were taken as the measure, or economic cost, then legal systems might be placed at different positions on the scale. Systems in which law consisted of technical signals administered by expensive specialist elite groups of judges, lawyers and policemen might be seen as "primitive" when compared to "sophisticated" systems capable of functioning without either.

It may simply be better to avoid ranking legal systems in this way. This does not mean that we deny ourselves the right and duty of assessing the efficacy of legal systems in their context—on the contrary, it makes it easier to do so free of the assumption that the system familiar to the observer is at the apex of human development.

A second point requiring consideration concerns the feasibility of expressing the norms and procedures of one legal system in terms of another. Warnings abound as to the dangers, but we again resort to the comparison with language. Translation is both possible and useful so long as it is recognised that some terms will have no exact equivalents and that in many cases only approximation can be achieved.

## APPLYING THE METHOD TO EXAMPLES FROM MĀORI CUSTOMARY LAW

In this section of our article we attempt to illustrate the method of analysis proposed. Each example is followed by an attempt to identify the "legal information" conveyed by the performance described.

Waiata Kākahu: *A Protective Song*

In 1849-50 Governor Grey travelled with the Ngāti Tūwharetoa chief, Iwikau Te Heu Heu, to Ngāti Tūwharetoa lands to attend important ceremonies following the death of Iwikau's brother, Mananui, in a landslide (Frame 2002). As the Governor's party prepared to leave for home, Iwikau sang the following song for Grey:

*Takoto te marino, horahia i waho,*
*Tarenga haki mai, nāu, e Kāwana*
*Tae rawa te uira, te tihi ki Tongariro,*
*Maunga rāhiri nau, e Kerei*

*Nunumi kino ana, te pikinga i Kaiwhare rā,*
*Aha tō te kanohi? Te hoki mai whaka-muri, e,*
*A ringa atu, e waikamo i roto rā, e,*
*Paheke nui ana, ko te ia, e huri i Taupo ra, e.*
*Ko te rite i au, e, nāku nei, whakaupa*
*He whakaūtanga rau; te iri noa atu,*
*Te Tīwai haere, nōu nā, e te Kupa.*

*Hei kawe ki tāwiti, noho ana i te rae*
*Horotiu rā, kia tomokia atu, te whare, i a Mata,*
*Kia whakaata mai, ki te kahu rīnena,*
*Kia tāraro au, te remu o te hīraka.*

Chris Winitana has translated his ancestor's words in the following way:

Serene are the waters, 'tis a widespread calm
Sourced to your flag; this enduring peace, yours, Governor.
Lightning strikes the summit of Tongariro,
Acknowledging your prestige and authority, Grey.

You ascend Kaiwhare and disappear from view,
Naught remains for my eyes, but to return here
To be wiped, for tears well up from within
And gush forth in a current that encircles Lake Taupo.
My task is complete, and I am satisfied.
The treasure chest shall be hung aloft
To swing gently to and fro, a salute to you Cooper.
Our memories shall be carried afar, to the very headlands
At Horotiu, to enter the house at Mata
Where they will be fondly appreciated, adorned with fine carving
And ornamented with chiefly white bird plumes.

This *waiata kākahu*, literally 'cloak-song', sung for Sir George Grey by Iwikau Te Heu Heu on 7 January 1850, illustrates the role of performance in creating rights and obligations and might usefully be regarded as akin to the modern "non-molestation order"—it cloaked the Governor in the protection of Iwikau and placed would-be trouble-makers on notice that consequences would follow for any who might infringe.[4]

Hinana ki Uta Hinana ki Tai: *A "Constitutional" Performance*

In the course of the same visit, Governor Grey presented Iwikau with a flag similar to the one presented before 1840 to the North Auckland tribes by King William IV. Iwikau's response was this song:

Tenei ka noho ki te take o te Kara;
Whakatu rawa iho taku noho ki raro ra;
Whakamau te titiro te ao, ka riaki,
Na runga ana mai te hiwi ki Takapuna,
I raro ra Kawana , e aroha mai nei i au , e–
Toro mai to ringa kia hari-ruia,
Ka tikamauru te aroha i au, e–
(Grace 1959:438-39)

Sir John Grace gives this translation:

Today I pay allegiance to the crown,
And by this flagstaff I take my seat.
O people everywhere lift up your eyes,
Behold the colours fluttering o'erhead!
From the hill at Takapuna, O Governor,
Came your greetings and your friendship.
So, extend your hand, my friend, that I may take it ,
For great indeed is my love for you.

The Governor's flag was subsequently to fly at the great 1856 *hui* to open the *pataka* named "Hinana ki Uta Hinana ki Tai" (literally, 'Look Inland—Look Seawards'). The gathering also had the important political purpose of discussing the setting up and selection of the Māori King. The flag given by Grey flew at the masthead. From a spar beneath it fluttered two further flags, one white and the other red. Sir John Grace[5] reports Iwikau's explanation: "You see the flags on each arm flying side by side. The white is the Pakeha and the red is the Maori" (Grace 1959:447).

The skill of Iwikau in reconciling the promise to his friend, the Governor, with a leading role in the creation of the Kīngitanga, is revealed in James

Cowan's description of the proceedings. The tribes assembled at Pūkawa around Iwikau's mast—representing Tongariro Mountain. Long ropes of plaited flax hung from lower points to the ground. Cowan reports that Iwikau called upon each tribe in turn to affix a flax strand to the ground:

> Each of the ropes representing these sacred mountains of the tribes was hauled taut and staked down, leaving Tongariro mountain in the middle, supported and stayed by all these tribal cords, and above floated the flag. Thus was the union of the tribes demonstrated (Cowan 1920:160-61).

Both the 1850 and 1856 events illustrate the way in which obligations are created and evidenced in performance cultures. The "legal information" conveyed by the performance in 1856 concerns the availability and acceptability to the tribes of a constitutional method for discussing and determining a position among the tribes on those issues that require a common policy. Observers of Māori politics will note that this institution remains active to the present time.[6]

*Ōhākī—Performed Wills*

James Cowan (Cowan 1910:342) tells us that in the days leading up to his death in 1894, Tāwhiao, the second Māori King,[7] made known his successor by chanting these "oracular words":

> *Papa te whaitiri,*
> *Ka puta Uenuku,*
> *Ka puta Matariki—*
> *Ko Mahuta te kingi!*

Cowan gives the following translation:

> The thunder peals,
> The Rainbow-god appears,
> The Pleiades shine forth
> Mahuta is the king!

Margaret Orbell (1991:97) explains that Tāwhiao figuratively associated the kingship of his eldest son, Māhuta, with the "*mana* and *tapu"* of thunder, the rainbow god Uenuku, and the constellation Pleiades or Matariki which traditionally heralds the start of the Māori New Year. This *ōhākī* or 'dying declaration' of Tāwhiao performs the function of the written will for the purpose of transferring political leadership. Tāwhiao announces his testamentary wishes to individuals gathered around in a public performance.

The public nature of the performance ensures that there are sufficient witnesses to attest to the wishes as well as inviting tribal support. Tāwhiao's words were celebrated by his people and incorporated into a composition for Māhuta (Orbell 1991:98-99 provides both Māori text and English translation).

Ko Māhuta Te Kīngi
Ko Māhuta te kīngi, hei kīngi hou,
Hei kīngi tuatoru mo te ao katoa.
Ko Te Paki o Matariki hei anahera,
Hei omaoma i waenganui i te iwi nui.
Ma mātou koe e hari atu. Haere,
E Māhuta, haere ki te ao katoa.

Māhuta is the King
Māhuta is the king, a new king,
A third king for all the world.
Te Paki o Matariki are his angels,
To speed amongst our people.
We will carry you forth. Go,
Māhuta, go out to all the world!

This composition, along with other expressions of adherence, served to confirm Māhuta's kingship. It became part of the tribal narrative and its ongoing recital represented the tribes' continuing support for King Māhuta.

On occasions *ōhākī* have been challenged for having insufficient public character. For example, the Native Appellate Court in 1895 held that words used by Renata Kawepo on his deathbed did not constitute an *ōhākī* in favour of Mr James Carroll and another. They stated: "Mr Carroll… was the only one present who heard the important words, and the words themselves are not, we think, of clear and deliberate character as to form a proper foundation for the "ohaki" set up".[8] The Court stressed the words were not clearly expressed in the presence of the near relatives.

He Waiata Whakautu Taunu: *Remedy for an Insult*

The great epics of the performative past of Māori were sung and chanted. Such compositions represent "case law" where precedent may be found. They can mark the beginning and/or end of a legal procedure, from formally laying an accusation to publicly acknowledging a settlement reached. At the marriage feast of Pōtatau te Wherowhero and Ngawaero (c.1815), Waata Kukutai, a visiting chief, commented disparagingly on the absence of preserved birds from the fare. Learning of these comments and overcome with embarrassment, Ngawaero sought to remedy this insult. She requested

the assistance of her Raukawa and Maniapoto relatives to carve an elaborate *kumete*, or ceremonial bowl, named "Hao-whenua". She then arranged for it to be filled with preserved birds and carried by eight men in procession at a subsequent feast. Wearing a prized heirloom,[9] Ngawaero led her people in the presentation of "Hao-whenua", with the performance of the following *pātere* (chant), intended both as a *kīnaki* (relish) and as a retort to Kukutai:

> E noho ana ano i te papatahi ā taku koro
> Whakarongo rua aku taringa
> Ki te hiha tangi mai a Kukutai
> Me aha koe i te awa, whakawhiti ki Puniu,
> Te Pikitia i te pinakitanga ki Turata, ko Te Arawi.
> E kore au, e Kahu, e aro iho he kaitata;
> Waiho tonu i te huanui…
>
> I am sitting on the marae of my spouse
> Mine ears hearing
> The sneers of Kukutai
> Regardless of the river I cross to Puniu,
> Do not climb the slopes to Turata, to Te Arawai!
> I will not turn aside, there is plenty of food;
> Left by the roadside… [10]

This *pātere*, still sung today by the Waikato-Maniapoto people, illustrates the adversarial use of food and *taonga*, and the dramatic expression of music and song, in the formal "shaming" of the named individual. The overall performance provided Ngawaero with a legal remedy for the slur on her reputation.

Hākari: *Talk Feasts*

One obvious category of performance-based customary legal transactions is the often-reported *hākari*. These were far from mere displays of food in abundance, being the occasion for resolution of all kinds of grievances and disputes. They were opportunities for exhaustive discussion and were the subject of comment before the 1838 House of Lords Select Committee set up to enquire into New Zealand affairs. A surgeon, Mr J. Watkins, who had spent some time in New Zealand, gave the following evidence before the Select Committee when questioned whether Māori had any persons to expound the Law:

> … they appear to have Councils or annual Meetings of Feasts there. Chiefs of various Tribes meet together and speak at great length…They reason very acutely indeed; and they have their Assistants to sit with them as Reporters

> to assist them to remember the speech. In case they would forget something they would refer to their friends.[11]

Disputes were literally talked out. A traveller, William Bambridge, described such an occasion at Kerikeri in March 1843, in which the parties joined together for a *kōrero* 'talk'. Grievances were brought forward, rectified, and resolutions made around a *hākari*. Bambridge gave a detailed description of the structure that was erected to display the gifts and noted some of the performative aspects surrounding the "talk feast":

> The scene was now one of great animation…At the time of my arrival, the party giving the feast was commencing their dancing, whilst the other party were stationed on the opposite hill in some degree of regularity with guns, spears & other various weapons ready to rush down to the stage as soon as the other party concluded their ceremony … (Bambridge 1843:21).

Such animation made the event memorable and signified the seriousness of a claim, relationship or transaction. The *hākari* structure added to the dramatic atmosphere of the experience. The partaking in the feast and acceptance of gifts provided a public statement that the recipients had accepted the outcome and any settlements arrived at.

Ka Tika tō Mate: *Symbolic Violence*

Where a wrong has been done, the wrongdoer and his group are regarded as being to a degree at the disposal of the wronged party and his group. John White reports in a Māori newspaper Governor Wynyard's conference with several chiefs of Waikato over the killing of a "Native" by a European. The Governor went there to ensure that no further outbreak of violence would occur. After a meeting with the chiefs, the Governor was referred to the father of the victim who declared:

> E Kawana ka tika to mate. Nau i haere mai ka tika taka kia patua koe. I patua a Te Wherowhero, ko koe e Kawana te tuarua o nga tupapaku. Ka mutu te patu, ka oti nei te hohou te rongo. Nau i haere mai ki te whare, no reira koe i mate ai. Ehara i au i karangatia ai koe; nau i haere mai ki au, no reira koe i mate ai. I mea koe ka tika to haerenga mai.
> Governor, your death is just; (alluding to the spear thrust into the earth, as figurative of a retributory victim for the murdered native) you came to me; it is right for me to kill you. Te Wherowhero was killed, and you O Governor are the second offering. Will you cease to kill, now that peace is made? You have come into the house hence your being killed. I did not call you; you came, so I will kill you. [12]

This encounter is clarified by John White in a footnote to the above:

> According to Maori usage the aggrieved should make concession, and propose peace; and should the aggressor have the hardihood to visit the injured party, his own life would be the penalty; hence the allusion, "you are mine" simply means, you are at my mercy, your life is at my disposal.

The account underlines the role of symbolic violence as a substitute for actual violence after a wrong. It represents a form of remedy as a public acknowledgment of the wrong and a restoration of *mana*.

Symbolic violence is a dramatic performance. It is not something one party does to another, but a cooperative act in which both sides must play their parts. An example is provided by the following account from the Native Agent for the Thames:

> I refer to a makutu, or witchcraft. Some four years ago an elderly Native named Te Pukeroa was accused of causing the death of the great Ngatitamatera chief Te Moananui; in fact the man (who is really a harmless monomaniac) confessed that he had exercised the black art, the result of which confession was a threat by Te Moananui's people to take his life; and to show that their rage was genuine, several of them surrounded his house one morning at daylight, and poured a volley into it. I do not think, however, they really meant murder, as they took the precaution the day before to send word to the Thames about their proposed expedition, so that the opportunity was taken to have the old man removed from his house to a place of safety. [13]

The subsequent resolution was arrived at in notable Māori fashion:

> The result of which was they forgave the old man (but cautioned him not to do the like again), averted the threatened tribal quarrel, and, metaphorically speaking, a general hand-shaking took place - not on the quiet, or in secret, but in grand style, according to most approved Maori custom. The meeting was held at Ohinemuri, and the Natives from the Thames (with whom was the wizard) were conveyed thither in two war canoes, one steamer, and numerous boats, all the men being armed; the whole, when they landed and joined with the Ohinemuri people in their war dances, &c., making quite an imposing spectacle. The speeches that were made were very few, being merely expressive of forgiveness on the part of the late Te Moananui's relatives and of peace-making on the part of the others ; an exchange of muskets took place to show that the wrong inflicted was forgiven, and the peace made a genuine one; after which the meeting ended and the Natives returned to their different homes apparently satisfied that, if a long and bloody war had not been brought to an end by their action, at least a threatened catastrophe had been averted.

Tapatapa Whenua: *Claiming Land by Personal Naming*

Sir Peter Buck/Te Rangi Hiroa, in his classic 1929 account *The Coming of the Māori*, has given a characteristically clear explanation of the custom by which land is reserved by persons of sufficient authority by naming it after parts of the namer's body:

> Te Arawa [the canoe], commanded by Tamatekapua worked along the coast westward to Maketu where she paddled in towards the mouth of the Ngapuna River. As they came in , the chiefs indulged in tapatapa whenua or taunaha which is the custom of pre-empting land by naming it after the parts of their body. This Tamatekapua pointed to the point now known as Maketu Heads and called out. "I name that place Te Kuraetanga o te ihu o Tamatekapua" (the projection of the nose of Tamatekapua). Tia identified the place now known as Rangiuru with the abdomen (takapu) of his son Tapuika, and Hei named Otawa the abdomen of Waitahanui a Hei. This ceremony effectively reserved the land indicated for those whose anatomical parts had been publicly announced, for no one would subsequently dare to cultivate on Tamatekapua's nose or build a house on someone else's abdomen (Buck 1970:55-56).

The Tapatapa Whenua ceremony had the purpose and effect of a formal reservation of rights to the namer.

Te Kawanga: *House Opening and removal of* Tapu

On 23 August 1922, the newly built Māori Affairs Committee Room of Parliament was formally opened with a mixture of Māori *kawa* and European protocol. Those in attendance included Māori politicians of the time, such as Sir James Carroll, Apirana Ngata, Tau Henare, the Prime Minster, several Ministers, other Members of Parliament, Members of the Judiciary, Heads of Departments and other distinguished Wellington figures. The *kawanga* ceremony was performed by Mita Taupopoki of the Tuhourangi tribe and other Te Arawa principals. Te Arawa, under the leadership of Te Kiwi Amohau, had been charged with the task of completing the carvings for the room.

> Na nga kaumatua o te Arawa i wewete nga tapu o ona whakairo, i karakia te karakia o te waere, te kawa, te toki, te takapou. No muri ka whakatuwheratia e te Minita Maori te taha pakeha, na ka hoatu e Te Kiwi te ki o te ruuma ki te wahine a te Minita, a na taua wahine i takahi te paepae o te ruma, i tomo hoki, i whakanoa.
>
> The elders of Te Arawa removed the tapu from their carvings, recited the incantations of the *waere* (addressed to the building as a whole, and to lift the tapu off the same), of the *kawa* (an incantation addressed to the building and calling on the powers to "ruruku", or bind together, the uprights and rafters), the *toki* (an incantation addressed to the tree in the forest whence,

> with the aid of the toki, or axe, the material for the carving, was obtained) and the *takapou* (lifting the tapu to enable the entry of women to the house and spreading the mat of occupation and use). Following this, the European ceremonies were performed by the Minister of Native Affairs and Te Kiwi presented the key to the wife of the Minister of Native Affairs. It was that woman who crossed the bar of the room, entered it and thus rendered it free from restrictions. [14]

The *kawanga* ceremony had the purpose of averting the dangerous effects of *tapu* and of making the house, or in this case the Committee Room, usable for the ordinary purposes for which it was intended. It is interesting to see how the occasion is used not only to recognise both cultures, but also to bridge them.

### Taonga *as Contracts*

A gathering in respect of the memory of Sir Donald McLean, a former Native Minister, was held at Waihirere Pa, Wairoa, on 29 January 1877. Three hundred of the principal Natives of the district were present. Mr Locke had been asked to attend on behalf of the Government, along with other European guests. Several speeches were recorded including that of Tamihana Huata. Having noted past troubles and declared his continued loyalty to the Government, Tamihana concluded with the presentation of a gift to Locke in honour of the memory of McLean:

> *Heoi, ka tango au i taku ritenga Maori ka hoatu ki a koe te kaitaka me te pounamu hei whakanui i te ingoa o tera kua mate nei—he ritenga tenei e kiia ana he Tapaetoto.*
> Now to conclude, in honor of the memory of him who has gone, I adopt my Maori custom and present you with a mat (a kaitaka) and a greenstone—this is called a Tapae toto. [15]

Dr Paki Harrison has also referred to the custom of *tāpae toto*. The Hauraki chief Paora Te Putu had transferred certain lands around Kennedy Bay to Ngāti Porou. Following his death, a *mere* known as "Whaita" and a cloak were presented to these Ngāti Porou as a *tāpae toto* that, along with intermarriages, served to confirm their tenure. The presentation of these *taonga* rendered it a permanent grant:

> It cements the authority by presenting the mere and the intermarriages that occurred at the time of the presentation, and looking back on it now it seems to me to be a very sensible thing to do, because it gave us the descendants, the right to argue the permanence of our tenure, not only in terms of the tāpae

> toto but in the preceding whakapapa that linked us through to Ngati Maru from Ahuahu right through Ngati Maru and all coastal people…[16]

The presentation, and the *taonga* itself, thus become evidence of the relationships and rights confirmed and granted.

This function is evident too in the presentations of *taonga* to Grey at the end of his first, and generally successful, term as Governor in 1853. At Otaki in September of that year, the Ngāti Raukawa, Te Atiawa, and Ngāti Toa tribes said their farewells to Governor Grey in the form of an address subscribed to by 272 signatures, in which expressions of admiration and affection were prominent. [17] A song followed lamenting the departure, and the greenstone pendant "Kaitangata" was presented to Grey in this way:

> Rangiuira, the wife of Rangihaeata, was led forward by several people, one of whom having cut the string by which a green jasper ear-ring (a very old heirloom of the Ngatitoa tribe) was attached to her ear, handed it first to Rangihaeata. The old chief then proceeded after the ancient Maori custom of "hongi" to press the greenstone to his nose, and pass it over his face in token of farewell, having finally parted with the precious heirloom of the tribe….

*Lifting* Rāhui: *An Argument about Capacity*

Not anyone can perform certain acts. Many performances require status and capacity. The Tūwharetoa chief, Tūreiti Te Heuheu gave the following account of the destruction of a *rāhui* in his evidence to the Native Land Court in 1888.[18] The *rāhui* was established because it was a recent burial place and therefore *tapu*. Te Heuheu recorded that:

> When we reached Te Pukeroa a "rahui" was standing there belonging to Ngati Maniapoto. I took off the garments that were on it and burned them. My companion was alarmed and ran away; my companion was Te Naihi. When we got to Waihora, Tokowhitu was crying at my having burnt the clothes, but Te Kirikau, the mother of Te Kahui endorsed my action…(Hikaka) had heard of my destroying the rahui, and declared I was right as I owned that land and said that I was the bridge of his nose… (Cowper 1888:4).

In performance cultures, legal disputes arise. Not everyone recognised Te Heuheu's legal right to perform such an act, he being regarded as a *teina* 'junior sibling' to the deceased. Te Paehua Matekau asserted that: "It would not be according to Maori custom for a younger relative to take off the tapu from what belonged to an older people" (Cowper 1888:32).

She claimed, rather, that it was Hauāuru who took the *tapu* off by "killing pigs", another example of an act to remove *rāhui*. Hauāuru himself maintained

he took the tapu off: "...I took it off myself... Tureiti is not an ariki of mine, that he could take it off." (Cowper 1888:46).

Nevertheless, Tūreiti Te Heuheu responded by insisting:

> I did not know at the time I was a "teina" of those "Tupapaku". I consider that if the teina possesses the necessary mana he would be able to take the tapu off. I know it is a Maori custom that it would not be proper for a teina of low degree to take the tapu off (Cowper 1888:21)
>
> .

The example shows how the success of a performance, and therefore its legal effectiveness, depends upon acceptance by the "audience" of the credentials of the performer.

Rongo-ā-Whare: *Women as Emissaries*

As we have already commented, in many cases if not all, an appreciation of the performer is necessary to understand the performance and the message being communicated. Traditionally, women conveyed overtures of peace as the following example illustrates. In 1874, the Resident Magistrate in Raglan, Mr Bush, reported the attendance of Tāwhiao's sister, wife and daughter to open the house "Tokanga-nui-ā-noho". The house was built by Hone Te One. The party of women was sent by Tāwhiao himself with messengers dispatched to prepare their arrival. Hone Te One had supported the Government during its conflict with Tāwhiao during the 1860s and there had been some animosity between the two since.

> On the 21st of November Hone te One's carved whare at Aotea was opened by Tiria, Tawhiao's sister, who was accompanied by Parehauraki, one of his wives, and his infant daughter. It was stated that these women had been especially deputed by him to perform this ceremony. The mere fact of a party of women being detailed for this work was looked upon as a good omen, auguring peace, by the friendly chiefs, it being a custom amongst their ancestors generally to send women to negotiate a truce, who sometimes were given to the hostile tribe as a surety of good faith, and whose wives in many instances they became, thus connecting the two tribes previously at enmity with each other.[19]

In performance cultures we should always be alert to what might be going on "behind the scenes". Sometimes the "performer" is merely a mouthpiece. During the speeches of welcome, Bush observed that, though Tāwhiao's sister, Tiria, did not speak, nevertheless the spokesmen consulted with her before replying to the speeches.

* * *

To conclude our essay, we have three comments to make. First, that the approach sketched in this essay will cause us to look carefully at the place of the performance elements in Māori and Polynesian customary law. A celebrated *hui* 200 years ago may have been the origin of constitutional consequences that persist today and are recorded, taught and "proved" in a song by an influential chief on the occasion. The presentation of an important *taonga*, recorded in action and song, may affirm and record the contractual relations between the parties. The carving on a meeting house may provide conclusive evidence as to descent relationships and customary rights. In each of these cases, it will be seen that, as Hibbitts suggests, "performance" provides opportunity for social participation, for consolidation and verification of both facts and norms, and for explication and legitimation of relationships. We agree with George Steiner's observation, in his introduction to Huizinga's book, regarding *hākari*-like institutions in many cultures involving ceremonial presentations of food and gifts: "Even spectacular waste when encapsulated in a social ritual, in a framework of agreed, and reciprocally binding rules, can prove to be a civilising agency" (Steiner 1970:11).

Several of the examples sketched in this article suggest that knowledge of the context of a performance—"what is really going on"—is necessary to interpret the function and efficacy of the performance. In many cases, performances of symbolic violence, for example acts of *muru*, were misinterpreted by early missionaries and colonial officials as actual violence and disorder, so encouraging the view that war was the only method available to Māori for the resolution of disputes. They often failed to see in the performance the meta-message about the public acknowledgement of a wrong, the restoration of *mana* between the parties, and the affirmation of social rules.

Second, if our hypothesis that Māori customary law is embedded in performance is correct, then that is a factor which must be taken into account in our Institute's stated objective of exploring ways in which the legal system of Aotearoa/New Zealand might better reflect the values and institutions of both our major component cultures. A particular implication might be that *participation by performance* in our legal system is likely to better accord with traditional Māori methods than the reduction of law to bureaucratic verbal signals. On this view, it ceases to be obvious that the removal of the dramatic elements and symbolism of legal process—much advanced in New Zealand and elsewhere on grounds of supposed "rationality"—represents undiluted progress. Hibbitts (1996) has noted the role in Western law of the formal court trial as a performance, describing it as "a unique opportunity for recalling, popularizing, approving and democratising the law".

Finally, a question is raised whether the bureaucratisation of legal process may starve the performance tradition of the "charismatic" and communal element on which it relies. The foregoing discussion pinpoints the diverging perspectives. The modern fashion assumes *comprehensibility and demystification* of the legal process to be the primary requirements, whereas the customary systems of both our major component cultures relied upon *performance and inspiration*—what Māori might call *ihi* and *wehi*—to a considerable extent. Weber (see Eisenstadt 1968:18-27) uses the terms "charismatic" and "rational" to contrast the two kinds of system. To take an example, when the enlightened decision was made early in the 20th century to recognise in New Zealand law the Māori custom as to adoption, it was provided that the traditional customary requirement that the process take place on the *marae*, before the tribe, be replaced by a registration system. After all, it was reasoned, a public register would provide the notification previously achieved on the *marae*: "The publication to the tribe, laid down as one of the essentials of adoption, is fully satisfied by the registration and gazetting of the notice of adoption under section 50."[20]

On the sort of analysis suggested here, it may be that the replacement of the "performance" element by formal registration is not just a "technical" change, but rather one affecting the very essence of the institution. Similarly, the understandable bureaucratic aspiration to develop dispute resolution processes which can be "mass-produced" by training courses and manuals may be frustrated by the inability of such processes to take into account the "charismatic" requirements of "performance cultures".

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NOTES

1. Professor Bernard Hibbitts' major work in this area is perhaps "Coming to our senses": Communication and legal expression in performance cultures, *Emory Law Journal*:.873-960. We also make use of Professor Hibbitts' paper delivered in March 1996 to the "Performance Studies Conference" at Northwestern University.

2. The French sociologist Roger Caillois, in his work *Man, Play, and Games* (translated by M. Barash, New York: Free Press of Glencoe, 1961) has discerned four different kinds of "play", and regards these as applicable to both the amusing and serious forms of activity. Caillois' four categories were *Agon* (games involving competition and contest), *Alea* (games involving chance), *Mimicry* (games involving fantasy and role-play) and *Ilinx* (games involving the deliberate creation of altered mental states).The range of these categories across both "amusing" and "serious" social activity is demonstrated by a few examples of each. *Agon* (rugby, the old "trial by battle", the modern "adversarial legal contest"). *Alea* (game of dice, the selection of a modern jury, deciding a Member of Parliament where the votes are tied). *Mimicry* (a child's make-believe game, "forcing" the Speaker of Parliament to take the Chair after her election, the Judge in full dress). *Ilinx* (a child's game of spinning to induce vertigo, the taking of the oath by a witness).
3. The draft Introduction may be found on the Te Mātāhauariki website: <www.lianz.waikato.ac.nz>.
4. The circumstances of the performance and the text, together with Chris Winitana's valuable translation of his ancestor's *waiata*, are presented in Frame 2002:58-59.
5. Sir John Grace is specific that the flag flown in 1856 was the one given by the Governor in 1850, attributing the confirmation to "notes by L.M. Grace in 1882 taken at the dictation of Ruingarangi" (Grace 1959:439).
6. Perhaps the most notable recent example being the *hui* at Hirangi *marae*, near Turangi, on 29 January 1995, called by Sir Hepi Te Heuheu and attended by over 1000 leaders and representatives, to reject Government's proposal to place a financial limit on the settlement of historic Treaty claims.
7. The first Māori King was the great Waikato leader, Pōtatau Te Wherowhero, elected in 1858.
8. Quote from newspaper clipping in Judge Rawson's "Treatise on Native Land Law", National Archives MA 16/3 at p. 9. Neither the title nor date of the article is given.
9. This heirloom was a *tiki* of greenstone named "Te Ngako" and was a prized possession of the notable Te Rangituamatotoru family of the Ngāti Tūwharetoa tribe. For a more dramatic account of this story see Pei Te Hurinui Jones (1959), *King Potatau: An Account of the Life of Potatau Te Wherowhero, the First Maori King*, pp. 134-46.
10. "He Patere na Ngawaero" in A. Ngata (1990), *Ngā Mōteatea* Vol. IV, song 319. The translation appears in *He Onamata: Songs from the Past, 1998, p. 30.*
11. Report from the Select Committee of the House of Lords appointed to Inquire into the Present State of the Islands of New Zealand…with Minutes of Evidence." Ordered to be printed , 8 August 1838 , p.29.
12. "Huinga o Te Kawana ratou ko nga Rangatira o Waikato", *The Maori Messenger: Te Karere Maori*, 1(3), March 1855, p.8; the account first appeared in *The New Zealander*, February 1854.

13. Report of G. T. Wilkinson, Native Agent, Thames, to the Under Secretary, Native Department, 28 May 1881. *Appendices to the Journals of the House of Representatives* (1881), G-8, p.8.
14. The report quoted is from "He Kawanga Whare", *Te Toa Takitini*, October 1, 1922, pp.7-8. A full report of the proceedings, with the text of the *karakia* and the speeches of the principal leaders, both Māori and Pākehā, is found in *Appendices to the Journals of the House of Representatives* (1922), I-3B, where the date of the occasion appears to be incorrectly stated as 23 October.
15. "Hui Maori i Te Wairoa", *Te Waka Maori O Niu Tirani*, 13b(3), 6 February 1877, p.49
16. Extract from transcript of Te Mātāhauariki *Pū Wānanga* (Seminar) with Dr Paki Harrison, James Henare Centre, University of Auckland, 28 April 2000.
17. The details of the Otaki ceremonies are reported in attachments to Grey's despatch ( No.118) to the Duke of Newcastle of 26 September 1853 , British Parliamentary papers, Vol. 9 , p.284-87; see Enclosures 1-4.
18. The case concerned a claim by Te Heuheu to have his children's names readmitted on the Ngāti Raukawa list of owners for the Rohe Pōtae Block. The case was recorded in *Otorohanga Minute Book No. 3* of the Native Land Court (see pp.112-19, 124, 173-74, 178-252, 254). However, an attested and more legible copy of the minutes of the main hearing (excluding some *whakapapa*) by H.W. Cowper, the Clerk of the Court, is held by the Alexander Turnbull Library, MS-Papers-4760-5.
19. Report of R.M. Bush, Resident Magistrate, Raglan, to the Hon. Native Minister, 21 May 1874, *Appendices to the Journals of the House of Representatives* (1874), G-2, p.10.
20. *Appendices to the Journals of the House of Representatives* (1908), v.II, G-5.

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